Supreme Court, U.S.
FILED
JUN 22 1995
OFFICE OF THE CLERK

(2)

No. 94-1896

In The
SUPREME COURT of the UNITED STATES
October Term, 1994

LINUS DUANE ROMERO, SR. and
DARLENE ROMERO

Petitioners,

versus

KMART CORPORATION, d/b/a
KMART DISCOUNT STORE NO. 7061

Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals,
Louisiana Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Ian A. Macdonald
Louisiana Bar Roll #17664
PERRET, DOISE, DAIGLE,
LONGMAN, RUSSO & ZAUNBRECHER
600 Jefferson Street, Suite 1200
Post Office Box 3408
Lafayette, Louisiana 70502-3408
(318) 261-1200

Attorney for Respondent

BEST AVAILABLE COPY

16 pp

QUESTION PRESENTED FOR REVIEW

Did the Fifth Circuit Court of Appeals apply the correct standard of review in affirming the district court's denial of petitioners' request to instruct the jury on the theory of strict liability under La. Civ. Code art. 2317 for a claim arising from a slip and fall accident?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Statute Involved 2

Statement of the Case 2

Summary of Argument 3

Argument 4

1. The Fifth Circuit performed a de novo review of the district court's decision 4

2. The Fifth Circuit correctly reviewed the district court's refusal to instruct the jury on strict liability for an abuse of discretion, because that decision was based in part on enforcement of a court rule 8

Conclusion 9

Appendix A 10

TABLE OF AUTHORITIES

Page

CASES

Pierce v. Underwood, 487 U.S. 552, 558, 108 S. Ct. 2541, 2547, 101 L.Ed.2d 490 (1988) . . 8

Salve Regina College v. Russell, 499 U.S. 225, 238, 111 S. Ct. 1217, 1221, 1222, 113 L.Ed.2d 190 (1991) 5, 6, 7

STATUTES

La. Civ. Code art. 2317 . . . . . 2, 3, 5

La. R.S. 9:2800.6 . . . . . 5, 6

No. 94-1896

In The
SUPREME COURT of the UNITED STATES
October Term, 1994

LINUS DUANE ROMERO, SR. and
DARLENE ROMERO
Petitioners,

versus

KMART CORPORATION, d/b/a
KMART DISCOUNT STORE NO. 7061
Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals,
Louisiana Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Respondent, Kmart Corporation [1], respectfully requests that this court deny the Petition for Writ of Certiorari which seeks review of the Fifth Circuit Court of Appeals' opinion below. That opinion is unpublished

---

[1]The full list of parties is included in the "parties" section of the Petition for Certiorari.

but reported at 44 F.3d 1005 (5th Cir. 1995) and 48 F.3d 533 (5th Cir. 1995), and is printed in the Petition for Writ of Certiorari at Appendix A and B.

STATUTE INVOLVED

The statute involved is La. Civ. Code art. 2317.

STATEMENT OF THE CASE

Kmart does not dispute Linus Duane Romero, Jr. and Darlene Romeros' recitation of the statement of the case, except to add the following. The Romeros first raised the issue of strict liability in their response to pre-trial order, which was submitted after all pre-trial deadlines had passed. Kmart objected to the addition of this theory at the final pre-trial conference. The district court offered the Romeros the opportunity to continue the trial in order to amend their complaint and allow Kmart time to prepare a defense. They declined. The district court then denied the Romeros' request to instruct the jury on strict liability, because the instructions were not warranted by the facts and the issue was not timely raised.

At the trial's conclusion, the jury found Kmart was not negligent, and the Romeros' claims were dismissed at their costs. The Romeros moved for a new trial based on, among other things, the district court's failure to instruct the jury on their strict liability claim under Article 2317. The district court gave two reasons for

denying that motion. First, the temporary condition of oil on the floor or a puncture in an oil container do not constitute a defect under La. Civ. Code art. 2317. Second, the Romeros did not timely give Kmart notice of their intention to raise a claim of strict liability within the deadlines provided under the court's rules. (Appendix A)

In its January 5, 1995 opinion, the Fifth Circuit Court of Appeals affirmed the district court's decision after an analysis of the applicable authorities. The Romeros' request for a rehearing en banc was denied with no active judge voting in favor of the rehearing.

In this petition, the Romeros argue the Fifth Circuit committed reversible error by applying an incorrect standard of review when analyzing the district court's decision. Specifically, the Romeros contend the Fifth Circuit reviewed the district court's decision under the deferential "abuse of discretion" standard rather than the plenary *de novo* standard. A review of the Fifth Circuit's opinion reveals, however, that it did in fact conduct a *de novo* review. Furthermore, the Fifth Circuit appropriately reviewed the district court's enforcement of its own rules for abuse of discretion. Therefore, certiorari should be denied.

SUMMARY OF ARGUMENT

The Romeros failed to satisfy the criteria necessary to invoke this court's discretionary jurisdiction, because the Fifth Circuit's opinion reflects a *de novo* review of the district court's decision.

Any deference by the Fifth Circuit Court of Appeals in affirming the district court's decision was appropriate, because the district court's enforcement of its pre-trial rules is reversible only if it represents an abuse of discretion.

ARGUMENT

1. The Fifth Circuit performed a de novo review of the district court's decision.

In an effort to obtain review here, the Romeros have mischaracterized the nature of the Fifth Circuit's review and analysis of the district court's decision not to charge the jury on strict liability. Focusing only on the Fifth Circuit's statement that the district court did not abuse its discretion in not giving the jury instructions on strict liability and its failure to publish the opinion rather than the court's analysis of the district court's decision, the Romeros suggests the Fifth Circuit reviewed the entire district court decision for an abuse of discretion, rather than conducting a *de novo* review. This suggestion is incorrect.

The district court's determination of a question of state law is reviewed *de novo* on appeal. A *de novo* review necessarily entails an independent and careful consideration of the district court's legal analysis. Any expertise the district court possesses will inform the structure and content of its conclusions of law and thereby become evident to reviewing court. If the appellate court finds the district court's analytical sophistication and research have exhausted the state law inquiry, little more need be said in the appellate opinion. Unlike a

discretionary review, *de novo* review does not admit unreflected reliance on a lower court's inarticulatable intuitions. Rather, the appellate court's decision will reflect its own considered opinion, even if it is the same as the district court. ***Salve Regina College v. Russell***, 499 U.S. 225, 238, 111 S. Ct. 1217, 1221, 1222, 113 L.Ed.2d 190 (1991).

The Fifth Circuit's opinion affirming the district court's decision evidences a thorough and independent consideration of the applicable legal authorities. Specifically, the opinion includes an exhaustive recitation of the pertinent facts and the applicable legal authorities. The opinion then proceeds to an application of these facts to the law, and a definitive conclusion that La. Civ. Code art. 2317 is inapplicable to the facts of this case. In its explanation of this conclusion, the Fifth Circuit cites the results of its own legal research and the conclusions it drew from that research. Going beyond the district court's limited discussion, the Fifth Circuit reasoned that the motor oil Romero slipped in was a hazardous condition *on the premises* warranting jury instruction only on negligence and on La. R.S. 9:2800.6, which were the instructions the district court gave to the jury.

After concluding La. Civ. Code art. 2317 was inapplicable in this case, the Fifth Circuit engaged in an analysis of the legal authorities the Romeros cite in support of its application. In doing so, the court not only discussed those authorities, but also its reasons for disregarding them. The district court engaged in no such analysis or discussion. In fact, the district court did not address any of the authorities the Romeros cited.

Considering the Fifth Circuit's opinion in its

entirety, it is quickly apparent that it reached its conclusions independently, and without the necessity of deferring to the district court's findings of fact or conclusions of law. If it had not engaged in this *de novo* review, its opinion would have specifically referenced its deference to the district court's decision rather than engaging in an exhaustive review or applicable legal authorities, and then applying them to the undisputed facts of this case. The cursory type of discussion typical of a court applying a deferential standard of review is best evidence by the appellate court's discussion in ***Salve Regina College v. Russell***, 499 U.S. 225, 238, 111 S. Ct. 1217, 1221, 1222, 113 L.Ed.2d 190 (1991). The Fifth Circuit's discussion and analysis of this case bears no resemblance.

The Romeros' contention the Fifth Circuit applied the incorrect standard of review ignores that court's discussion of the facts and law. Rather, the Romeros base their argument solely on the Fifth Circuit's acknowledgement that the district court did not abuse its discretion in refusing to give the jury instructions on strict liability. In doing so, the Romeros confuse the Fifth Circuit's acknowledgement of the district court's discretion in fashioning jury instructions and enforcement of its pre-trial deadlines with the standard applicable to its own review of those instructions. A reading of the decision in context reflects that after a recitation of the facts, the Fifth Circuit recognizes the latitude given the district court when instructing the jury on a possible theory of the case. The court then engages in its own analysis of the principals of strict liability applicable to slip and fall cases such as this. After concluding the facts warranted instructions only on negligence and La. R.S. 9:2800.6 and distinguishing the authorities the Romeros

cite does the court recognize in passing that the district court did not abuse its discretion. In this context, it is evident the Fifth Circuit's reference to the district court's discretion is in part its acknowledgement the district court's analytical sophistication and research exhausted the state law inquiry. It does not represent an unreflected reliance on the district court's decision.

The Romeros also suggest the Fifth Circuit's failure to publish its opinion evidences its failure to apply a *de novo* standard of review. In doing so, they rely entirely on the Fifth Circuit's rejection of dictum contained in an unpublished opinion of a district court decision in another case, because it could find no other case adopting that court's analysis. From this, the Romeros conclude that the Fifth Circuit was compelled to publish its opinion unless it was merely explaining the basis for its deferential finding that the district court had not abused its discretion. This argument, however, ignores fact that the criteria for publication of opinions does not include that court's analysis and disposition of legal authorities which are neither necessary for the disposition of the case or contained in dicta from other cases.[2]

In light of the foregoing, the Romeros failed to satisfy the criteria traditionally applied by this court in determining whether to grant a writ a certiorari. Specifically, this case involves no conflict amongst the Federal circuit courts, the decision is in accord with Supreme Court precedent e.g. ***Salve Regina College v.***

---

[2]See Citation of Local Rule 47.51 at p. 9 of the Romeros' Petition.

Russell, 499 U.S. 225, 238, 111 S. Ct. 1217, 1221, 1222, 113 L.Ed.2d 190 (1991), and it presents no conflict with any law. Further, the facts in this proceeding are sufficiently unique that their precedential value are likely to be minimal.

2. The Fifth Circuit correctly reviewed the district court's refusal to instruct the jury on strict liability for an abuse of discretion, because that decision was based in part on enforcement of a court rule.

An appellate court will review a district court's decision involving issues of supervision over the litigation for abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 558, 108 S. Ct. 2541, 2547, 101 L.Ed.2d 490 (1988). As the Fifth Circuit recognized, the district court's refusal to charge the jury on strict liability was also based on their failure to timely raise that claim, a point the Romeros' writ application omits. Therefore, the Fifth Circuit's review of the district court's decision necessarily included a determination of whether it abused its discretion in enforcing its deadline. In light of its recognition that this was one of the basis for the district court's refusal to instruct the jury on strict liability, the Fifth Circuit's conclusion that the district court did not abuse its discretion in not giving the jury instructions on strict liability is consistent with the applicable standard of review.

CONCLUSION

Accordingly, for all the foregoing reasons, the petitioners' request for writ of certiorari should be denied.

Respectfully submitted,

PERRET, DOISE, DAIGLE,
LONGMAN, RUSSO &
ZAUNBRECHER

IAN A. MACDONALD
Louisiana Bar Roll #17664
600 Jefferson Street, Suite 1200
P. O. Drawer 3408
Lafayette, LA 70502-3408
(318) 261-1200
Attorney for Respondent

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Linus Duane Romero, Sr., et al	Civil Action No.: 93-0292
v.	Judge Shaw
Kmart Corporation	Magistrate Judge Methvin

****

RULING

Now before the court is a motion for new trial filed by plaintiffs, Linus Duane Romero, Sr. and Darlene Romero, pursuant to Rule 59 of the Federal Rules of Civil Procedure.

Although Rule 59(a) provides the authority for granting a motion for new trial, it does not set forth the various grounds upon which a court may grant a new trial. Among the grounds commonly used are those that the verdict is against the weight of the evidence, the damages are excessive, or that for other reasons the trial was not fair. Bazile v. Bisso Marine Company, Inc., 606 F.2d 101 (5th Cir. 1979); *Smith v. Transworld Drilling Company*, 773 F.2d 610 (5th Cir. 1985); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S. Ct. 189, 85 L.Ed. 147 (1940).

In this case the plaintiffs have stated two basis for their motion: (1) The trial was not fair because the court failed to instruct the jury on plaintiffs' article 2317 claim; and (2) The verdict was against the weight of the evidence.

The court struck the plaintiffs' claim under La. Civil Code article 2317, for strict liability, for two reasons: (1) Strict liability has no application to the facts as alleged in this case; and (2) Plaintiffs did not state strict liability as a theory of recovery in any pleading to give notice that he was proceeding with such a claim, and did not notify the defendant that he was proceeding with a strict liability claim until after discovery was complete. The defendant's first notice of such a claim was in the pretrial order prepared just prior to the pretrial conference, three weeks prior to trial.

Strict liability does not apply to cases in which there is a temporary presence of a substance on a premise. The presence of a foreign substance does not create a vice or defect inherent in the thing itself to give rise to a claim in strict liability. *Simmons v. City of Monroe*, 22393 (La. App. 2d Cir. 10/30/91) 588 So. 2d 1357; *Goleman v. Kroger & Company, Inc.*, 84-43 (La. App. 3d Cir. 1/30/85) 462 So. 2d 1330.

The temporary condition of oil on the floor or the puncture in the oil container do not constitute a defect under La. Civil Code article 2317.

Secondly, the plaintiff did not timely give notice to the defendant of his intention to raise a claim of strict liability within the deadlines provided under this court's rules.

With respect to the plaintiffs' motion for new trial on the basis that the verdict is against the weight of the evidence, this court finds that the facts presented, more than adequately, support the jury's verdict in this case.

The evidence at trial supported various inferences for the jury to resolve. It is within the jury's province to weight the evidence and accept the testimony which it finds credible. This court will not substitute its own finding for that of the jury. This court finds that the jury verdict is supported by the record.

Accordingly, for the reasons stated herein, the motion for new trial filed by the plaintiffs, Linus Duane Romero, Sr. and Darlene Romero, is DENIED.

Lafayette, Louisiana, March 25, 1994.

s/John M. Shaw
John M. Shaw
United States District Judge

Judgement Entered 3/28/94
By: sjd
Copy to: Curtis
Macdonald